NEW JERSEY LAW PROHIBITS WORKER MISCLASSIFICATION

NOTICE OF EMPLOYEE RIGHTS & EMPLOYER RESPONSIBILITIES

WHAT IS MISCLASSIFICATION?

- Misclassification is the practice of an employer improperly classifying employees as independent contractors.
- Misclassification may illegally deprive workers of basic rights, protections, and benefits guaranteed to employees such as the right to be paid the **minimum wage,** the right to **overtime** pay, **time and mode of pay** protections, the protection against **illegal deductions** from pay, **unemployment compensation, temporary disability benefits, family leave insurance benefits, workers' compensation, family leave** and **earned sick leave.**
- Often when workers are paid in cash "off the books", it may be a method to hide misclassification or other employment related legal obligations.

AM I AN EMPLOYEE OR AN INDEPENDENT CONTRACTOR?

- **Under New Jersey's Unemployment Compensation Law, Wage and Hour Law, Wage Payment Law, Wage Collection Law**, Temporary Disability Benefits Law (including sections providing for Family Leave Insurance) and Earned Sick Leave Law, if you perform a service and are paid, **you are presumed to be an employee,** unless the employer can prove all three of the following:

  (A) You have been and will continue to be free from control or direction over performance of the service, both under a contract of service and in fact; and

  (B) The service is either outside the usual course of the business for which such service is performed, or the service is performed outside of all the places of business of the enterprise for which such service is performed; and

  (C) You are customarily engaged in an independently established trade, occupation, profession or business.

- This is referred to in New Jersey as the **"ABC test"** for independent contractor status.
- Please go to **www.myworkrights.nj.gov** to learn about the factors considered for each of the three above tests.

DO I HAVE TO PROVE THAT I AM AN EMPLOYEE?

- No. If you worked and were paid, you are presumed to be an employee. It **is the employer's burden** to show that all three parts of the ABC test are met.
- If the employer can't meet its burden to establish all **three** parts of the ABC test, then you are deemed to be an employee, entitled to the rights, protections, and benefits of an employee under the above-cited New Jersey laws.
- If you believe you are misclassified, email **misclass@nj.dol.gov.**

DOES IT MATTER IF I RECEIVED AN IRS FORM 1099, AS OPPOSED TO IRS FORM W-2?

- No. It does not matter which federal tax form the employer uses to report earnings.
- What matters are the facts surrounding your working relationship with the employer and the application of the ABC test to those facts.

IF MY EMPLOYER HAD ME SIGN AN INDEPENDENT CONTRACTOR AGREEMENT BEFORE HIRING ME, DOES THAT MAKE ME AN INDEPENDENT CONTRACTOR?

- No. Your employment status is determined based on an analysis of all the facts surrounding your relationship with the employer under the ABC test.
- NJ DOL would review the agreement you signed but your employment relationship would not be determined by this agreement alone.
- New Jersey courts have ruled that to consider only the agreement, if one exists, and not the totality of the facts surrounding your relationship with the presumed employer, would be to "place form over substance," which the courts say is wrong.

WHAT HAPPENS WHEN IT IS FOUND BY A STATE AGENCY OR COURT THAT AN EMPLOYER HAS MISCLASSIFIED AN EMPLOYEE AS AN INDEPENDENT CONTRACTOR?

In addition to the award of a remedy or remedies to make the misclassified employee or the State agency whole for the employer's violation of the underlying New Jersey wage, benefit or tax law (for example, the award of back pay to the misclassified employee who has been illegally deprived of the statutory minimum wage or overtime premium pay in violation of the State Wage and Hour law, or whose pay was subject to illegal deductions in violation of the State Wage Payment law), New Jersey law also empowers the Department of Labor and Workforce Development to take **actions** and impose **penalties** against an employer who has misclassified employees including:

- A **penalty paid by the employer to the misclassified employee** of not more than 5 percent of the worker's gross earnings over the past 12 months.
- A **penalty of up to $250 per misclassified employee for a first violation and up to $1,000 per misclassified employee for each subsequent violation.**

- For violation of State wage, benefit or tax laws in connection with the misclassification of employees, the imposition of
    - A **stop-work order.**
    - The **suspension or revocation of any one or more licenses that are held by the employer** and that are necessary to operate the employer's business.
    - Additional **penalties and fees payable to the Department** and where wages are owed to the employee, an additional amount in **liquidated damages payable to the employee equal to not more than 200 percent of the wages owed.**

AM I PROTECTED FROM RETALIATION BY MY EMPLOYER FOR REPORTING MISCLASSIFICATION?

- Employees are protected from retaliation by their employers for having made an inquiry or complaint to the employer, to the Commissioner of Labor or to an authorized representative regarding any possible violation by the employer of any State wage, benefit or tax law, including those inquiries or complaints that involve misclassification, or because the employee caused to be instituted or is about to cause to be instituted any proceeding under or related to State wage, benefit or tax law, or because the employee has testified or is about to testify in such a proceeding.
- Where such retaliation has occurred, the Department is authorized by law to issue an administrative penalty against the employer; however, only the courts are authorized by law to order reinstatement and/or back pay.

REPORTING MISCLASSIFICATION

If you have been misclassified and would like to file a claim, you can do so here:
https://wagehour.dol.state.nj.us/default.htm

To seek further information:

EMAIL:	**CALL:**	**FAX:**	**WRITE:**
misclass@dol.nj.gov	609-292-2321	609-292-7801	Employer Accounts Subject – Misclassification NJ Department of Labor and Workforce Development 1 John Fitch Plaza P.O. Box 942 Trenton, NJ 08625-0942

- Whichever way you chose to reach out, multilingual staff will be able to assist you and translation assistance made available as needed
- You can also visit **www.myworkrights.nj.gov** to learn more about misclassification.

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